

**IN THE HIGH COURT OF TANZANIA  
(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**CIVIL APPEAL NO. 237 OF 2020**

*(Originating from Civil Case No. 124 of 2017 at Kisutu Resident  
Magistrates Court)*

**ELISANTE WILBARD KIRITA..... APPELLANT**

**VERSUS**

**PAUL ALPHONCE MUNISSI.....RESPONDENT**

*Date of Last Order: 04/05/2021*

*Date of Judgment: 20/05/2022*

**JUDGMENT**

**MGONYA, J.**

The above Appellant being aggrieved by the decision of the Kisutu Resident Magistrates Court, has knocked the doors of this honourable Court with five **(4) grounds** of appeal as hereunder:

- 1. That, the trial Magistrate erred in law and facts by holding that the Plaintiff failed to prove his case on the required standard while the exhibits tendered by the Plaintiff and evidence given on the side of the Plaintiff were sufficient to prove his case on the required standard which is balance of probabilities.***

***2. That, the trial Magistrate erred in facts and law by failing to take into consideration the inconsistency of the defence's evidence as he was departing from his own pleading and contradicting himself while giving evidence including denying his signature in the Written Statement of Defence.***

***3. That, the trial Magistrate erred in facts by holding that exhibit P4 did not show clearly the purpose of depositing the money to the bank while the purpose of depositing the money to the bank is indicated clearly in the said exhibit and was deposited to the Respondent's account.***

***4. That, the trial Magistrate erred in law and facts by conferring herself to the matters which was not framed as an issue between the parties, hence going beyond the pleadings of the parties and addressed an issue which were not in dispute and which was not framed.***

The matter before this Honourable Court was heard by way of written submissions of which the parties adhered to the scheduling order as ordered by this Court hence this decision.

Submitting on the **1<sup>st</sup> ground** of appeal, the Appellant states that the trial Magistrate erred in arriving its decision by

stating that the claim against the Respondent herein was not proved; even though there was a number of exhibits that were tendered to support the Appellant's claim. There was in Court records that demonstrated ownership of the motor vehicle and how the same came to the hands of the Appellant herein. The Appellant further states that there was the Sale Agreement proving that the Appellant bought the vehicle. Further that, there were two contracts that were signed by the 1<sup>st</sup> Respondent to prove the 20,000,000/= refund and other evidence as adduced by the witness that appeared to testify for the Appellant.

Moreover, it is averred that there was in existence written evidence which was the Sale Agreement which by the provisions of **section 101 of the Tanzania Evidence Act Cap. 6 [R.E. 2019]** provides that, where there is a written Contract the same cannot to be challenged by oral evidence or with the purpose to vary, add or contradict the written contract.

It is the Appellant's submission on the **2<sup>nd</sup> ground** of appeal that, the Respondent's testimony was inconsistent with his pleadings. It is a principle of law that parties are bound with their pleadings. The Respondent at the time of hearing of the appeal disputed the names that the Appellant addressed him claiming that is not his name and therefore he is not the one involved in the sale of the motor vehicle. The Appellant informed this Court that he identified the 1<sup>st</sup> Respondent by his two names

differently spelt and interchangeably used. That is Paulo Alphonse Munishi and Paul Alphonse Munissi. Therefore, the Respondent denying his names is immaterial for the same names appear in his own Written Statement of Defence interchangeably.

Further, the Appellant informed this Court that the Respondent further denied the signature affixed next to his name in the Written Statement of Defence; saying that, this action is baseless and aim at distorting justice. It is further the Appellant's view that, if the denial of Respondent's names and his signature had weight, he had the right to claim that the same was forged and be struck out from the Court records, but that was not the case.

Arguing the **3<sup>rd</sup> ground** of appeal, the Appellant avers that, the Court erred in deciding on the ground that Exhibit P4 which is the bank deposit slip did not clearly show the purpose of the deposite. It is evidently seen on the face of exhibit P4 that the purpose of the deposit was "malipo ya gari" and the same shows the deposit was with the Respondent's bank account. The same was in the name of one Paulu Paulu Alphonse Munissi who is the Respondent herein.

It is further, reiterated by the Appellant that Exhibit P1 which is the Sale Agreement, Exhibit P.5 which is the 1<sup>st</sup> Agreement for a refund of **Tshs. 20,000,000/=**, Exhibit P. 6

which is the 2<sup>nd</sup> Agreement for the **Tshs. 20,000,000/=** refund and Exhibit P. 3 which is the Motor Vehicle Registration Card all these corroborated the purpose of depositing the money into the Respondent's account. The same were required to be taken collectively and not separately so as to reach to a just decision.

It is on the **4<sup>th</sup> ground** of Appeal that, the Appellant states that the Resident Magistrate erred by conferring the Court's decision to matters which were not framed as issues by the parties to the case and hence led the Court beyond the pleadings of the parties. It was further submitted that, it is the principle of law that whenever an issue is framed, parties ought to submit on the same. That, intrusion of new issues of which parties have not submitted to is in consistence to the requirement of law.

In reply to the Appellant's submission; the Respondent on the **1<sup>st</sup> ground** of Appeal avers that, the Appellant's ground is misconceived since the exhibits tendered alone do not prove the case at hand. The same are bearing different names and hence raise discrepancies in the Appellant's evidence before the Court. Further, the number of exhibits or witnesses does not justify that the case has been proved to the standard required. Hence making this ground devoid of merits.

Arguing on the **2<sup>nd</sup> ground** of appeal, the Respondent states that the same is misconceived since the addressed issue of forgery by the Appellant were never raised at the time of

hearing and therefore cannot be entertained at this stage. That, is a common well known principal that, matters to be determined at appellate stage must have been raised at an early stage of hearing and be recorded. The issue on forgery was not one of the issues and hence this ground is meritless.

On the **3<sup>rd</sup> ground** of Appeal, the Respondent disputes the money that the Appellant claims to have been deposited in the Respondent's account. It is so since Exhibit P4 the bank slip did not specify what the money was for in the slip. The Respondent urged that the Appellant was required to state in the bank slip the purpose of the deposited monies. And when testifying on the same, the Appellant was required to confirm the contents of the slip and not add or subtract any information contained in the said bank slip. He prayed that this Court find this ground of Appeal meritless.

It is on the **4<sup>th</sup> ground** that the Respondent submits that the Appellant claims the Court to have raised new issues. It is the Respondent affirmation that they have gone through the records and have not found the said issues but only the arguments and reasoning of the Court.

Having summarized the Appellant's submission and that of the Respondent, I now turn to determine the grounds of Appeal as hereunder.

On the **1<sup>st</sup> ground** of appeal, the Appellant is aggrieved on the Courts decision on how it arrived to its decision by stating that the Appellant failed to prove his case while all required exhibits to prove the case were tendered for evidence. The Respondent on the other side is in support of the Court's decision basing their argument that the exhibits tendered in the trial Court had different names and hence causing a discrepancy to the exhibits. Further that the tendering of the said exhibits, do not qualify the case to have been proved on the balance of probabilities.

Having gone through the proceedings of the matter at the trial Court, it has come to the knowledge of the Court that the Appellant had purchased a Motor vehicle from the Respondent, of which the same has passed through some other hands before landing to the Respondent. All these facts were evidenced by Sale Agreements and the same were tendered before the Court without the Respondent objecting. Consequently, it is an disputed fact that the Sale Agreement between the Appellant and the Respondent at the top shows that the one selling the car is one **Arobogast** but at the bottom the same person that signed to be selling the same was the Respondent. After the Respondent had entered into an Agreement to sell the motor vehicle to the Appellant, payments were made into his account and the bank slip was also tendered before the Court to prove

that the said Sale Agreement was honoured by executing payment of the consideration that is **Tshs. 19,000,000/=**.

From the records there was an argument of which still persist to this appellate stage. The Respondent states to have disputed that the names in the Sale Agreement were not his names hence he had nothing to do with the Appellant neither had he ever engaged in any business with the Appellant let alone sale of a motor vehicle.

The argument is that the Appellant claims **Paulo Alphonse Munissi** or **Paul Aphonse Munishi** are one and the same person. The Appellant backs up his argument through the Written Statement of Defence where the said names were used interchangeably and the Respondent still signed the pleading without seeking any rectification of the names.

Further, despite the two mentioned names above being used interchangeably in records, the same were at different times prayed to be tendered and yet the Counsel for the Respondent never raised any objection regarding the names of the Respondent of which would have reflected that the Respondent was not the proper party.

Since suing a wrong party to a suit results to an execution that cannot be performed, in accordance with the records availed before this Court from the trial Court, find that the Respondent's act of total denial was an afterthought since it appears in his



defence after all documentary evidence had been admitted in Court during the prosecution case and no objection was raised of which I find the Respondent's names were used interchangeably.

The Counsel for the Respondent appeared in Court and was present at the time when the exhibits were tendered and never objected. The law of **Evidence Act Cap 6 [R.E. 2019] under section 100** states that:

***100.-(1) When the terms of a contract, grant, or any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant, or other disposition of property, or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act.***

The above provision is to be read together by the provisions of **section 101 of the Evidence Act** which states:

***101. When the terms of a contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 100, no evidence***

***of any oral agreement or statement shall be admitted, as between the parties to that instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from its terms.***

From the above and from the records of the trial Court, I am of the firm view that the total denial by the Respondent appears to be an afterthought since all the exhibits were not objected at the time of trial and from the principal above, bearing in mind the argument of the names that appeared in the Sale Agreement between the Respondent and the Appellant; together with the Sale Agreement between one **Arobogast Maganga Matata** and the Respondent the same was purposely done and in the knowledge of the Respondent for reasons known to himself as to why he entered into execution for such an agreement with a difference of names. I find that the exhibits were in place and are protected by the provisions above. **Therefore, this Court finds this ground of appeal meritorious.**

On the **2<sup>nd</sup> ground** of appeal, the same based on the inconsistency of the Respondent's evidence at the time of his defence whereas the Respondent went a mile in denying his own signature in the Written Statement of Defence. Before determination of this ground, I would take this opportunity to

cement on the cardinal principal that parties to a suit are strictly bound by their pleadings. This principal does not exonerate the parties to this suit.

It is from the records that the Plaintiff filed in Court was attached with all exhibits that were tendered and the same was served to the Respondent and had ample time to go through the same and file a reply to the same. The Written Statement of Defence being filed by the Respondent I am firm that the contents of the same are in his knowledge.

The claim that he does not know how to read and write well neither does he know English or that he is not in the knowledge that he is bound by his pleadings are all an afterthought and means to deny the claims against him does not hold water taking into consideration he enjoyed the services of a learned Advocate that represented him in Court. The Respondent had seen and noticed the name that was in the Plaintiff that addressed him and hence had time and chance to object the same but that was not the case. In the case of ***Yara Tanzania Limited v Charles Aloyce Msemwa t/a Msemwa Junior Agrovet & 2 Others, Commercial Case No. 5 of 2013, Mwambegele J. (as he then was)*** it was held that:

***"It is cardinal principle of law of civil procedure founded upon prudence that parties are bound by their pleadings ... If I may be required to add***

***another persuasive authority from Nigeria, I would add Adetoun Oledoji (Nig) Ltd v Nigeria Breweries PLC (2007). In which it was also categorically stated that it is settled law that parties are bound by their pleadings. That is the position of the law in Nigeria as well as in this Jurisdiction. See Peter Karanti and 48 others v Attorney General and 3 Others, Civil Appeal No. 3 of 1988 at Arusha (unreported)."***

I have to admit that, the above principle was not adhered to by the Respondent or considered by the trial Court and that the said denial by the Respondent was not justified or did not cure the pleadings. There was enough room for the Respondent to seek the Court's order to cure what was denied by the same. **It is from the above that I find this ground of appeal has merits.**

It is on the **3<sup>rd</sup> ground** that, the Appellant is against the Court's decision for deciding in favour of the Respondent who declared that Exhibit P4 which was the bank slip that was proof of depositing money to the Respondent's account for not clearly stating the reason for the deposit. The evidence of the Appellant at the trial Court declares that after the contract for sale of the car, the purchase price was deposited with NMB Bank by the name of Paulu Paulu Munishi and the slip tendered in Court. It

was the Appellant's claim that the purpose for the deposit was payment of the purchasing price. This Court having the lower Court record reached out for the bank deposit slip which is Exhibit P4 and went through it so as to ascertain what is argued for by the Appellant. It is on the face of Exhibit P4 that the slip at the left has illustrated the reason for the deposit and it clearly appears on the slip.

On the strength of the digested findings of the contents of the deposit slip by this Court from the records I am satisfied that the deposit slip bears all necessary requirements required that is the name of Respondent which are similar to the names that he has been addressed by and the ones that appears in his pleadings and the purpose of the payment also appears in the same. Having said all of the above, **I find this ground has merits.**

On the **last ground** of Appeal, it was argued by the Appellant that the Court framed new issues and determined the same while the Respondent contests that through the Judgement the said new issues were not traced. It is alleged that during the hearing of the case there were three issues that were framed and that were:

***1. Whether the first defendant lawfully repossessed the vehicle with registration***

- number T 557 BHH from the Plaintiff's ownership;*
- 2. Whether the Plaintiff is entitled to refund the purchase price; and*
- 3. To what reliefs are the parties entitled to.*

Having gone through the decision of the Court to ascertain whether the assertion by the Appellant exist with respect to the ground raised, I have observed the issues that were framed and agreed by the parties to be the same issues that were all determined at making the decision of the Court. The Judgment was properly constituted and contained a concise statement of the case, the points for determination, the decision and the reasons for such determination.

From the above, I acknowledge that there were no issues that were raised unlike the ones raised by the parties. It is a requirement that the Court should at all times stick to issues raised by the parties at the time of determining a case at hand. **Hence this ground of appeal is meritless.**

**Basing on the premises the appeal is allowed to the extent so explained. I hereby proceed to quash both Judgment and Decree of the trial Court. It follows therefore that; the Respondent is ordered to pay the Appellant the claim of Tshs. 20,000,000/=.**

The Appellant is to have his costs form the Respondent accordingly.

It is so ordered.

Right of appeal is explained.



Handwritten signature of L. E. Mgonya in blue ink.

**L. E. MGONYA**

**JUDGE**

**20/05/2022**

**Court:** Judgment delivered before Honourable **J. Luambano Deputy Registrar** in the presence of Mr. Noel Sanga learned Advocate for Respondent also holding brief Mr. Ngemela learned Advocate for the Appellant; and Mr. Richard RMA on this 20<sup>th</sup> day of May, 2022.



Handwritten signature of L. E. Mgonya in blue ink.

**L. E. MGONYA**

**JUDGE**

**20/05/2022**